

**ALPINE RETURN SDN BHD v. MATTHEW NG HOCK SING
& ORS**

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI J

[ORIGINATING SUMMONS NO: WA-24NCVC-1864-10-2020]
12 JULY 2021

Abstract – *When the housing developer and the purchasers are under the same belief that an extension of the delivery of vacant possession of the project is valid at the time of the execution of the sale and purchase agreements ('SPAs') and the entire extension process is validly performed, the purchasers ought to be estopped from reneging on the SPAs. Whilst it is crystal-clear from the Federal Court case of Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals that a Housing Controller has no powers to grant extensions under reg. 11(3) of the Housing Development (Control and Licensing) Regulations 1989 which is ultra vires the Housing Development (Control and Licensing) Act 1966, the purchasers' claims for liquidated and ascertained damages is not considered a genuine pursuit when it can potentially result in the purchasers gaining an unfair benefit at the expense of the housing developer, especially when the latter has adhered to the requirements of the Regulations.*

LAND LAW: *Housing developers – Sale and purchase agreement ('SPAs') – Delivery of vacant possession – Developer applied to amend and extend period to deliver vacant possession from 36 months to 60 months in Sch. H of Housing Development (Control and Licensing) Regulations 1989 ('Regulations') before commencement of works – Extension allowed pursuant to reg. 11(3) of Regulations – Whether ultra vires Housing Development (Control and Licensing) Act 1966 – Whether extension granted void – Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals – Whether applicable – Purchasers claimed for liquidated and ascertained damages for late delivery of vacant possession – Whether purchasers attempted to unjustly enrich themselves – Whether doctrine of estoppel by conduct applied – Whether SPAs contractual documents binding contracting parties – Whether SPAs enforceable*

LAND LAW: *Vacant possession – Delivery of – Housing developers – Sale and purchase agreement ('SPAs') – Developer applied to amend and extend period to deliver vacant possession from 36 months to 60 months in Sch. H of Housing Development (Control and Licensing) Regulations 1989 ('Regulations') before commencement of works – Extension allowed pursuant to reg. 11(3) of Regulations – Whether ultra vires Housing Development (Control and Licensing) Act 1966 – Whether extension granted void – Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals – Whether applicable – Purchasers claimed for liquidated and ascertained damages for*

- A *late delivery of vacant possession – Whether purchasers attempted to unjustly enrich themselves – Whether doctrine of estoppel by conduct applied – Whether SPAs contractual documents binding contracting parties – Whether SPAs enforceable*

B The plaintiff, a company involved in the business of property development, sought a declaration that the sale and purchase agreements of condominium units it had executed with the defendant purchasers were valid, whilst the defendants counterclaimed for damages arising from the alleged invalidity of certain terms of the agreements. The plaintiff was incorporated to develop a premium mixed development project comprising exclusive condominium and commercial shop lots in Kuala Lumpur. The plaintiff decided to undertake a residential project together with common facilities ('project')

C known as Residensi Star. The defendants were individuals who later executed sale and purchase agreements as purchasers to their respective condominium units at Residensi Star. The plaintiff had been advised by its architect and its consultant that the plaintiff would require at least 60 months

D to construct and complete the project. This, according to these experts, was attributed to factors such as, among others, complex structural designs and foundation works. Because of the advice that completion of the construction of the project would take at least 60 months, and this was plainly beyond the 36-month period stipulated in Sch. H to the Housing Development (Control and Licensing) Regulations 1989 ('Regulations'), before the commencement

E of works at the project and the sale of parcels in Residensi Star to the public, in a letter to the Ministry of Housing and Local Government ('Ministry'), the plaintiff applied to amend and extend the period to deliver the vacant possession of the parcels and for the completion of the common facilities for the project from the 36 months specified in Sch. H to 60 months

F ('extension'). The Housing Controller of the Ministry allowed the extension pursuant to reg. 11(3) of the Regulations ('extension letter'). This then led the plaintiff to proceed with the execution of the sale and purchase contract as prescribed in Sch. H with the purchasers of parcels in Residensi Star, including the defendants ('SPAs'), but with the necessary amendments to

G cls. 25 and 27 of Sch. H, in accordance with reg. 11(3) of the Regulations, and with s. 24 of the Housing Development (Control and Licensing) Act 1966 ('HDA'). The relevant SPAs were executed on 9 December 2014 and 19 January 2015. Subsequently, in the notice of vacant possession dated 11 November 2019, the plaintiff informed the purchasers – including the

H defendants – that the construction of the project, including the common facilities, had been completed and by virtue of the Certificate of Completion and Compliance (Form F) also dated 11 November 2019, the parcels of Residensi Star were certified to be safe for occupation. As such, the vacant possession of the parcels was ready to be delivered to the purchasers, the defendants included. The deemed delivery of vacant possession, as stated in

I the notice, was after 14 days; hence on 25 November 2019. As such, the completion and delivery were effected by the plaintiff within the 60 months stipulated in the SPAs. However, the defendants now contended that

reg. 11(3) of the Regulations which confers on the Housing Controller the power to waive or modify any provisions of the statutory sale and purchase agreement as prescribed in Sch. H to the Regulations is *ultra vires* the HDA. This consequentially meant, according to the defendants, that the extension granted by the Housing Controller to the plaintiff and the project in 2014 was void. In other words, the defendants asserted that the plaintiff must deliver vacant possession of the said parcels to the defendants and complete the common facilities to the project within 36 months from the date of the execution of the respective SPAs in December 2014/January 2015 in accordance with the statutory terms in Sch. H in the Regulations. This stance of the defendants arose entirely from the decision of the Federal Court in the case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals* ('*Ang Ming Lee*'). In this originating summons, the plaintiff principally prayed for a declaration that the extension letter was valid and a declaration that the time to deliver the vacant possession for the parcels and the completion of the common facilities for the project which as stated under cls. 25(1) and 27(1) of the SPAs was 60 months from the date of the SPAs was valid and enforceable. The defendants then filed a fresh counterclaim against the plaintiff, claiming for liquidated and ascertained damages ('LAD') for the late delivery of vacant possession of the parcels and the delay in completing the common facilities of Residensi Star.

Held (allowing plaintiff's originating summons, specifically prayer 2; dismissing defendants' counterclaims):

- (1) In the absence of the extension, or if it had been refused by the Housing Controller, the plaintiff would not have undertaken the project as the plaintiff was fully cognisant at the planning stage and before any works had been commenced or before any SPAs were executed, that the construction timeline for the said project would be considerably affected by its site restrictions, location and cost effectiveness. Commercially too it would have been impossible to complete Residensi Star within 36 months, knowing full well that the plaintiff would then be contractually obligated to pay LAD to the purchasers for each day of delay. In *Ang Ming Lee*, the request for extension of time was made after the commencement of the project and subsequent to the execution of the sale and purchase agreements with the purchasers. (paras 39-41)
- (2) The defendants, at the material time, even prior to the execution of the SPAs, were equally fully cognisant that the delivery of vacant possession of the parcels and the completion of common facilities for the project would be 60 months from the date of the SPAs. They had never expected, on the basis of the SPAs (inclusive of the terms on the purchase price, as discounted and granted rebate) receiving the delivery of vacant possession of the parcels together with the completed common

- A facilities of Residensi Star within 36 months. The defendants had also never raised any objections towards the extension, such as after the first 36 months had lapsed, until after the decision in *Ang Ming Lee*, post the delivery of vacant possession by the plaintiff. In contrast, the purchasers in *Ang Ming Lee* were not told that after the execution of the agreements with the purchasers, the developer applied for an extension beyond the 36 month period originally stated in the agreements. The purchasers were clearly denied the right to be heard prior to the developer pursuing the unilateral amendment which had been approved by the Ministry. Further, unlike in *Ang Ming Lee* where the extension was granted by the Minister on an appeal pursuant to reg. 12 of the Regulations, the extension herein was granted by the Housing Controller under reg. 11(3) of the Regulations 1989. There was no appeal here. However, in *Ang Ming Lee*, although the extension of time was granted by the Minister on appeal, the letter of extension of time was in fact signed by the Housing Controller and not the Minister. This was found to have been erroneous. As such, in the instant case, unlike in *Ang Ming Lee*, there was no irregularity as to which party signed and issued the extension under reg. 11(3) of the Regulations. (paras 42-45)
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- (3) The key consideration in *Ang Ming Lee* on the need of the purchasers as aggrieved parties who needed the protection from the court was absent and irrelevant in this case. Both the plaintiff and the defendants were under the assumption that the extension letter was valid, not void or illegal, when they executed the SPAs at that material time. The plaintiff had proceeded on and relied on the conduct of the purchasers, including the defendants and was of the belief that the time to deliver vacant possession were agreed to be extended to 60 months and as such accordingly agreed to sell the parcels to the purchasers. The plaintiff had acted as a responsible developer in making the application to amend the construction period of 36 months to 60 months in Sch. H before entering into the SPAs with the purchasers, including the defendants. There was absolutely no ambiguity in the language of cls. 25 and 27 of the SPAs. (para 76)
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- (4) There was nothing untoward in the application for the extension which was supported by the experts and consultants for the project. The procedures to apply for the extension was governed by the Ministry. The plaintiff was merely complying with the procedures of the Ministry and the law as then prevailing including in reg. 11(3) of the Regulations. There was no suggestion, let alone evidence, that the plaintiff had engaged in any illegality in the making of the application for the extension then. The defendants herein were resorting to the authority of *Ang Ming Lee* to unjustly enrich themselves, despite the fact that the defendants were expecting the completion of the project within 60 months and they did receive the vacant possession of the parcels within
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the expected and agreed period of 60 months in accordance with the SPAs without any protest and objection, and on purchase terms predicated on the said period of 60 months. (paras 77 & 85)

- (5) If the LAD claims were allowed (the total LAD allowed for each unit of the parcels was about 20% on the purchase price of the SPAs) and after taking into account the 12% rebate and considering the costs of construction among others, the actual purchase price paid by the defendants for a unit of condominium at Residensi Star would be unreasonably cheap to the detriment of the financials of the developer. The purchasers should be estopped from not following the SPAs as executed by them by taking advantage of the ruling in *Ang Ming Lee* to unjustly enrich themselves. Even though there was absolutely no disputing that the extension was not valid given that reg. 11(3) had been ruled to be *ultra vires*, in situations like presently where the modifications such as the extension was secured prior to the execution of the contract of sale under Sch. H with the purchasers and obtained without any illegality or irregularity on the part of the developer, and there were no concerns about the need to ensure the protection of the purchasers in the SPAs, the doctrine of estoppel by conduct could be applied to prevent the defendants from denying the terms as contained in the SPA. (paras 86 & 87)
- (6) The estoppel should apply for, based on the conduct of the plaintiff and the defendants before and after the execution of the SPAs, the parties had incontrovertibly agreed on the completion timeline of 60 months as recorded in the SPAs (which had been first preceded by a then valid process which secured the extension), and where the parties had accordingly arranged their respective obligations and affairs in reliance of the same. The plaintiff began construction and delivered vacant possession almost 60 months after the execution of the SPAs on purchase terms which took into account the completion timeline of 60 months, and the defendants too made the progress payments over the same period. The period of 36 months never featured in the relationship between the parties before *Ang Ming Lee*. It would be extremely unjust if the defendants were allowed to now claim that delivery of vacant possession must instead be made within 36 months. Although the extension letter and the extension were undoubtedly void as a result of *Ang Ming Lee*, the defendants should be estopped from not honouring the terms of the SPAs, even though the timeline of 60 months in the SPAs emanated from the extension. The SPAs themselves although prescribed under Sch. H to the Regulations, were essentially still contractual documents that bind the contracting parties. (paras 90 & 93)
- (7) Whilst it is crystal-clear from *Ang Ming Lee* that the Housing Controller has no powers to grant extensions under reg. 11(3) which is thus *ultra vires* the HDA, the counterclaims by the defendants for LAD could not

- A be said to be a genuine pursuit to enforce the right of the weaker party against a defaulting stronger party (the plaintiff) which could instead potentially result in the defendants gaining an unfair benefit at the expense of the plaintiff. The plaintiff did not commit any illegality, irregularity or depart from the provisions of the Regulations in force at the material time. The plaintiff adhered to the requirements of the Regulations, applied for the extension under reg. 11(3) which was allowed by the Housing Controller before the amendments were made to cls. 25 and 27, and prior to the execution of the SPAs with the defendants. There was no unilateral amendment, no amendments after the execution of the SPAs, and there was no appeal to the relevant Minister either. And there was absolutely no denial of the right to be heard to the defendants as the purchasers. (para 97)
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- (8) Whilst taking full cognisance that the Regulations and the HDA are social legislations designed to protect the interest of the purchasers, the courts are ever entrusted with the duty to ensure that justice is served. An appropriate balance must be struck after taking into account the interests of especially the purchasers and also the developers, whilst at the same time should not be oblivious to the context of the housing development industry – of not only future but also completed and pending projects. As such, although reg. 11(3) is now *ultra vires*, on the very specific facts of this case, the defendants were estopped from reneging on the SPAs and claiming LAD since all parties were under the same belief that the extension was valid at the time of the execution of the SPAs and the entire extension process was validly performed *sans* any infringement at the material time. Based on the foregoing analysis, whilst this court denied prayer 1 for a declaration that the extension letter was valid, because it was not, this court decided by reason of the application of the principle of estoppel, to allow the declaration that the time to deliver the vacant possession for the parcels and the completion of the common facilities for the project as stated under cl. 25(1) and cl. 27(1) of the SPAs as 60 months from the date of the SPAs to be valid and enforceable. (paras 98 & 99)
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Case(s) referred to:

- Abillah Labo Khan v. PP* [2002] 3 CLJ 521 CA (*refd*)
- Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Applications* [2020] 6 CLJ 55 HC (*refd*)
- H *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162 FC (*dist*)
- Dsara Sentral Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah & Satu Lagi* [2020] 1 LNS 1172 HC (*refd*)
- Eco Green City Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Ors* [2020] 1 LNS 430 HC (*refd*)
- I *Ho Shee Jan v. Stephens Properties Sdn Bhd* [1984] 1 LNS 155 HC (*refd*)
- Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285 FC (*refd*)

- Kok Chay Har & Ors v. BH Realty Sdn Bhd* [2021] 1 LNS 13 HC (*refd*) A
- Lee Shy Tsong & Yang Lain lwn. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Yang Lain* [2020] 1 LNS 1641 HC (*refd*)
- Loh Chow Sang & Anor v. Meru Valley Resort Bhd* [2001] 8 CLJ 410 HC (*refd*)
- Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720 CA (*refd*)
- Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 CA (*refd*) B
- National Westminster Bank plc v. Spectrum Plus Limited & Ors* [2005] All ER 209 (*refd*)
- Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan* [2013] 1 LNS 146 HC (*refd*)
- Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252 CA (*refd*)
- PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 FC (*refd*) C
- PP v. Dato' Yap Peng* [1987] 1 LNS 28 HC (*refd*)
- Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 FC (*refd*)
- Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2016] 7 CLJ 823 FC (*refd*)
- Star Effort Sdn Bhd v. Tiong Sie Kwon & Ors (Originating Summons No WA-24-7-02-2020) (Unreported)* (*refd*) D
- Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173 FC (*refd*)
- Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557 FC (*refd*)
- Legislation referred to:**
- Contracts Act 1950, s. 64 E
- Criminal Procedure Code, s. 417
- Evidence Act 1950, s. 115
- Federal Constitution, art. 4
- Housing Development (Control and Licensing) Act 1966, ss. 16A, 24
- Housing Development (Control and Licensing) Regulations 1989, regs. 11(3), 12, Schedules G, H cls. 25(1), 27(1) F
- Land Acquisition Act 1960, s. 40D
- For the plaintiff - Cecilia Tan Shee Shia, Chia Lui Meng & Soon Zhen Hui; M/s Soh Hayati & Co*
- For the defendant - Ashok Kandiah, Norvindran Sivarajah & Lim Jun Yik; M/s Ho Loke & Koh* G
- Reported by Suhainah Wahiduddin*

JUDGMENT

Mohd Nazlan Ghazali J: H

Introduction

[1] In this originating summons, the plaintiff developer sought for a declaration that the sale and purchase agreements of condominium units it had executed with the defendant purchasers are valid, whilst the defendants counterclaimed for damages arising from the alleged invalidity of certain terms of the agreements. I

- A [2] At the conclusion of the hearing which was conducted by way of Zoom video communication technology, I found for the plaintiff and dismissed the counterclaim. This judgment contains the full reasons for my decision.

The Litigants

- B [3] Incorporated in Malaysia, the plaintiff company has a total paid-up capital of RM40 million and is involved in the business of property development.

- C [4] The plaintiff was incorporated to develop a premium mixed development project comprising exclusive condominium and commercial shop lots in the heart of Kuala Lumpur. Its two shareholders are United Malayan Land Berhad and Symphony Life Berhad, both publicly listed on Bursa Malaysia, and are established developers in the property development industry.

- D [5] The plaintiff in 2013 decided to undertake a residential project “Cadangan Pemajuan 3 Blok Kondominium 50-54 Mempunyai 557 Unit Kediaman Atas Lot-Lot 109, 130-138 Dan Sebahagian Lot 108, Jalan Yap Kwan Seng/Jalan Mayang, Kuala Lumpur” together with common facilities (“the project”). It is also known as Residensi Star.

- E [6] The defendants are individuals who later executed sale and purchase agreements as purchasers to their respective condominium units at Residensi Star.

The Background To The Residensi Star Project

- F [7] The starting reference is the Housing Development (Control and Licensing) Regulations 1989 (“the Regulations”), specifically on the provision concerning the statutory sale and purchase agreement prescribed under Schedule H to the Regulations where the developer is required to deliver vacant possession of the parcels and to complete the common facilities of the residential development within 36 months. Failure on the part of the developer entitles the purchasers to be paid by the developer liquidated damages.

- H [8] This is a very basic provision of the Regulations. There is no doubt it was known to the plaintiff when planning for the project. In fact, plaintiff had been advised by its architect, Veritas Architects Sdn Bhd and its consultant, TY Lin International Sdn Bhd that the plaintiff would require at least 60 months to construct and complete the project.

- I [9] This, according to these experts was attributed to factors such as among others complex structural design and foundation work with complex bored piles to be carried out near Jalan Yap Kwan Seng/Jalan Mayang, limited construction time stipulated by Kuala Lumpur City Hall (DBKL) from 8.30am to 6pm from Monday to Saturday only, and the traffic

congestion at the site of the project which was located at the interchange of Jalan Yap Kwan Seng, Jalan Tun Razak and Jalan Ampang, affecting the movement of heavy vehicles and the delivery of construction materials into the site. A

[10] Because of the advice that completion of the construction of the project would take at least 60 months, and this is plainly beyond the 36-month period stipulated in Schedule H to the Regulations, and before the commencement of works at the project and the sale of parcels in Residensi Star to the public, in a letter dated 3 June 2013 to Ministry of Housing and Local Government (“the Ministry”), the plaintiff applied to amend and extend the period to deliver the vacant possession of the parcels and for the completion of the common facilities for the project from the 36 months specified in Schedule H to 60 months (“the extension”). B C

[11] In a letter dated 29 September 2014, the Housing Controller of the Ministry allowed the extension pursuant to reg. 11(3) of the Regulations (“extension letter”). D

[12] This then led the plaintiff to proceed with the execution of the sale and purchase contract as prescribed in Schedule H with the purchasers of parcels in Residensi Star, including the defendants (“the SPAs”), but with the necessary amendments to cls. 25 and 27 of Schedule H, in accordance with reg. 11(3) of the Regulations, and with s. 24 of the Housing Development (Control and Licensing) Act 1966 (“the HDA”). The relevant SPAs were executed on 9 December 2014 and 19 January 2015. E

[13] These two clauses, post the amendments, which now formed part of the SPAs read as follows: F

Clause 25 – Time for delivery of vacant possession

- (1) Vacant possession of the said Parcel shall be delivered to the Purchaser in the manner stipulated in clause 26 within sixty (60) calendar months from the date of this Agreement.
- (2) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under the provisions of this Clause shall accrue on the date the Purchaser takes vacant possession of the said Parcel. G

Clause 27 – Completion of common facilities

- (1) The common facilities serving the said housing development shall be completed by the Vendor within sixty (60) calendar months from the date of this Agreement. The Vendor’s architect shall certify the date of completion of the common facilities. H
- (2) If the Vendor fails to complete the common facilities in time, the Vendor shall pay immediately to the Purchaser liquidated damages to be calculated from day to day at the rate of ten per centum (10%) per annum of the last twenty per centum (20%) of the purchase price. I

A [14] At the same time, the plaintiff also sought to adhere to the terms and conditions imposed in the Advertising Permit and Developer's License for the said project as specified by the Ministry ("the APDL"). The plaintiff thus offered the purchasers – including the defendants, for each of their parcels – the option to obtain either a 3% discount on the listed selling price or a cashback equivalent to 3% of the purchase price stated in the SPAs. All the defendants opted for the 3% discount on the listed selling price. As such, the purchase price stated in the SPAs was after the deduction of the 3% discount given to them.

C [15] In addition, the plaintiff granted a rebate of 12% on the purchase price of SPAs (after the 3% discount) to the defendants. This rebate was given by way of credit notes, in the following order; the first 5% upon the execution of the SPAs; the second 3.5% on the first progress claim and the third and final 3.5% on the second progress claim.

D [16] Then, finally, in the notice of vacant possession dated 11 November 2019, the plaintiff informed the purchasers – including the defendants – that the construction of the project, including the common facilities had been completed and by virtue of the Certificate of Completion and Compliance (Form F) also dated 11 November 2019, the parcels of Residensi Star were certified to be safe for occupation. As such, the vacant possession of the parcels was ready to be delivered to the purchasers, the defendants included. The deemed delivery of vacant possession as stated in the notice was after 14 days; hence on 25 November 2019.

The Suit

F [17] As such, the completion and delivery were effected by the plaintiff within the 60 months stipulated in the SPAs (in fact almost towards the expiry of the 60-month period). However, the defendants now contended that reg. 11(3) of the Regulations which confers on the Housing Controller the power to waive or modify any provisions of the statutory sale and purchase agreement as prescribed in Schedule H to the Regulations is *ultra vires* the HDA. This consequentially meant, according to the defendants, that the extension granted by the Housing Controller to the plaintiff and the project in 2014 is void. In other words, the defendants asserted that the plaintiff must deliver vacant possession of the said parcels to the defendants and complete the common facilities to the project within 36 months from the date of the execution of the respective SPAs in December 2014/January 2015 in accordance with the statutory terms in Schedule H in the Regulations.

H [18] This stance of the defendants arose entirely from the decision of the Federal Court in the case of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281.

[19] The defendants first acted through their solicitors to send notice of demand to the plaintiff, and thereafter filed their respective writs and statements of claim against the plaintiff at the Kuala Lumpur Sessions Court. There the defendants sought a declaration that the extension is *ultra vires* the HDA, a declaration that the plaintiff must deliver the vacant possession of the parcels and complete the common facilities for the project within 36 months from the date of the SPAs, and for payment of damages for the late delivery of the vacant possession and the late completion of the common facilities, to be commenced after the expiry of the 36 months and until 14 days from the date of the notice of vacant possession. The plaintiff filed a counterclaim.

[20] However, the parties agreed to withdraw their respective claims and counterclaims and decided to instead to litigate their dispute in this originating summons proceedings commenced by the plaintiff in this High Court. The plaintiff principally prayed a declaration that the extension letter is valid and a declaration that the time to deliver the vacant possession for the parcels and the completion of the common facilities for the project which as stated under cl. 25(1) and cl. 27(1) of the SPAs is 60 months from the date of the SPAs is valid and enforceable.

[21] The defendants then filed a fresh counterclaim through their respective affidavit in reply against the plaintiff, claiming for liquidated and ascertained damages (“the LAD”) for the late delivery of vacant possession of the parcels and the delay in completing the common facilities of Residensi Star.

[22] The details of the LAD claims by the defendants are as follows:

Party	Unit No.	LAD for vacant possession of the parcels (RM)	LAD common facilities (RM)	Total LAD claimed (RM)
First defendant	1-39A-3	197,075.30	38,598.77	235,674.07
First defendant	1-39A-6	198,871.79	38,950.63	237,822.42
Second defendant	1-39-7	252,091.31	49,433.80	301,525.11
Third defendant	1-38-7	251,900.76	49,396.44	301,297.20
Fourth defendant	1-37-7	250,566.95	49,134.88	299,701.83
TOTAL		1,150,506.11	225,514.52	1,376,020.63

A The Summary Of The Contentions Of The Parties

[23] In support of its originating summons, the plaintiff raised a number of arguments, chief of which revolves on the decision of the Federal Court in *Ang Ming Lee (supra)* which it said ought to be distinguished. This is because in that case, the developer had already entered into the sale and purchase agreements with the purchasers of the condominium units which provided that the delivery of the units was 36 months from the date of the agreement, in line with Schedule H of the Regulations.

[24] But the developer in that case subsequently without the knowledge of the purchasers applied to the Housing Controller of the Ministry for an extension of time, pursuant to reg. 11(3) of the Regulations. An extension was eventually granted by the Minister on appeal pursuant to reg. 12 after it was initially refused by the Housing Controller. The sale and purchase agreements were then amended without the consent of the purchasers being obtained, denying their right to be heard, and depriving them the rights to claim for liquidated ascertained damages. The application for the extension of time by the developer was thus made after the agreements were signed by the purchasers in which the initial completion date of the agreements was contracted to be 36 months in accordance with Schedule H.

[25] In contradistinction, the plaintiff in the instant case before me had, as mentioned earlier, before commencing the works, and prior to the entry of the SPAs with the defendants, applied to the Ministry and obtained the extension, for the construction period being extended from 36 months to 60 months.

[26] The plaintiff thus alleged that instead of seeking the assistance of this court in circumstances where the purchasers were unjustly taken advantage of, as was the situation in *Ang Ming Lee*, the defendants here are capitalising on the decision in *Ang Ming Lee* to unjustly profit themselves, as reflected in their claims for LAD in the counterclaim.

[27] The plaintiff then submitted that the defendants ought to be estopped from now contending that there was delay in delivering the vacant possession of the parcels and in completing the common facilities for the said project based on their own conduct, and also especially after the SPAs had been signed for some five years back and even after they have received the vacant possession of the parcels without any protest and objection.

[28] In addition, the plaintiff also posited that given the facts of this case that the purchasers, including the defendants were fully aware that they had bargained for a contract for completion of 60 months and not 36 months, this justified the application of the doctrine of prospective overruling. This is because the retrospective effect of a change in the law through *Ang Ming Lee* could have extreme, disruptive and unfair consequences.

[29] The plaintiff also advanced the argument that if the parties are prohibited from entering into the SPAs where the completion period is not 36 months, but 60 months, the entire SPAs must therefore be illegal as they are against the HDA. In other words, the SPAs being void *ab initio* without the plaintiff or the defendants being aware of the true legal position at that material time. Alternatively the LAD claims cannot in any event be allowed since the defendants had voluntarily entered into the said SPAs and are therefore in *pari delicto* to the alleged illegality.

[30] In their opposition to the originating summons and in support of the counterclaim, the defendants maintained the stance that the decision in *Ang Ming Lee (supra)* has ruled that reg. 11(3) of the Regulations is *ultra vires* the HDA. As such, even though the said extension in the instant case was obtained by the plaintiff before the execution of the respective SPAs, it remains *ultra vires* the HDA. This is further confirmed in the case of *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* [2020] 6 CLJ 55; [2020] 10 MLJ 689 where on the facts, it appears that the High Court decided that the decision of the Federal Court in *Ang Ming Lee* would apply to cases where the extension of time was obtained even before the signing of the sales and purchase agreement between the purchaser and the developer.

[31] The defendants contended that the doctrine of estoppel does not apply against a statute or statutory agreement such as in the instant case which revolves around the clauses of a statutory agreement as prescribed in Schedule H to the Regulations. The principle of waiver or estoppel is thus not applicable when reg. 11(3) of the Regulations is *ultra vires* the HDA.

[32] For largely the same reasons, the defendants submitted that the doctrine of unjust enrichment is not applicable because the SPAs are statutory agreements in which the terms and conditions have to comply with the Regulations which are designed to protect public interest.

[33] It was further highlighted that the High Court in the case of *Alvin Leong (supra)* has decided that the decision in the case of *Ang Ming Lee* applies retrospectively.

[34] Further, the defendants rejected the contention that the defendants were in *pari delicto* since they had no knowledge that the amendments effected by the plaintiff to the SPAs are *ultra vires* the HDA at the time of the execution of the SPAs. The defendants emphasised that they only became aware of this after being advised by their solicitors that such modifications by the plaintiff are *ultra vires* the HDA.

A Analysis And Findings Of This Court*The Federal Court Decision In Ang Ming Lee*

B [35] This must be the starting point of this analysis. It is thus worthy of emphasis that the Federal Court in *Ang Ming Lee (supra)* ruled that the power vested in Housing Controller under reg. 11(3) of the Regulations to extend time for completion of a development project is *ultra vires* the HDA. The following passages from the judgment of Her Ladyship Tengku Maimun Tuan Mat CJ encapsulate the essence of the decision of the Federal Court:

C [41] The legislative intent that the duties shall remain with the Minister, may be discerned from ss. 11 and 12 of the Act. Under s. 11, whilst the Controller is given the power to investigate on the reason why a licensed housing developer is unable to meet his obligation to the purchasers, or is about to suspend his building operations or is carrying on his business detrimental to the interests of the purchaser, it is the Minister who is empowered to give directions and to take such other measures for purposes of safeguarding the interests of the purchasers and for carrying into effect the provisions of the Act. Likewise under s. 12 which provides for the powers of the Minister to give general directions as he considers fit, to the licensed housing developer for purposes of ensuring compliance with the Act. Such directions, which shall be given in writing, are binding on the developer.

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F [55] Finally, on the third task. In the instant appeals, the Schedule H contract of sale prescribed by the Regulations is to carry into effect the provisions of the Act, which is to protect the interests of the purchasers. The regulations made by the Minister must thus achieve the object of protecting the interests of the purchasers and not the interests of the developers. And at the risk of repetition, the duty to protect the interests of the purchasers is entrusted to the Minister.

...

G [56] By delegating the power, *vide* reg. 11(3) to the Controller to waive or modify the prescribed terms and conditions of the sale of contract, it is now the Controller who has been entrusted to regulate the terms and conditions of the contract of sale. Further, by modifying the prescribed terms and conditions and by granting the developer the extension of time, the Controller has denied the purchasers' right to claim for LAD. This modification and the granting of extension of time to the developer, does not appear to us to protect or safeguard the purchasers but rather the developer and this militates the intention of Parliament.

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I [57] It was submitted for the developer that the purchasers would suffer greater hardship if the project is not completed as compared to not being able to claim for LAD. With respect, we fail to see the merit of this submission. If the developer fails to obtain an extension of time to deliver vacant possession, that in itself does not mean that the developer has failed to complete and hence, have abandoned the project. Whether or not the developer is granted an extension of time does not necessarily

determine the fate of the project. The extension of time only determines payment of LAD. In this regard, we must not lose sight of the purchasers' obligations to pay for progress instalment to their respective housing financier and/or payment of rental to their landlord. It is a matter of balancing the commercial interest of a multi-million housing development company against the life-time loan commitment of a purchaser for a basic living necessity. As can be seen from the long line of authorities, it is the interests of the purchasers that prevail over that of the developer. We therefore hold that in allowing the Controller to waive or modify the terms and conditions of the contract of sale and in the process, denying the purchasers' right to claim for LAD as prescribed by the Minister under Schedule H, reg. 11(3) does not comply with the description of the Regulations which is designed to protect the interests of the purchasers.

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[36] The underlying and overriding intention of the Federal Court in *Ang Ming Lee* as expressed in unmistakable fashion in the judgment written by Her Ladyship Tengku Maimun Tuan Mat CJ is to protect the interests of the purchasers, as the weaker parties in the sale and purchase agreements under the said Schedule H to the Regulations. The following is only one of the many emphasis on that point found in the judgment:

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[40] The Act being a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer. Parliament has entrusted the Minister to safeguard the interests of the purchasers and the Minister has prescribed the terms and conditions of the contract of sale as per Schedule H. We find no contrary indication in the language, scope or object of the Act that such duty to safeguard the interests of the purchasers may be delegated to some other authority.

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[37] In another recent decision of the Federal Court in *Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation* [2020] 10 CLJ 285, in holding the Strata Management Act 2013 to be a social legislation, Her Ladyship Tengku Maimun Tuan Mat CJ referred to *Ang Ming Lee* and again stressed the point that the HDA as a social legislation was legislated to protect house buyers from the developers, as follows:

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[24] The determination of the above question would necessarily involve the wholesome interpretation of s. 120 of the NLC *vis-a-vis* s. 70 of the SMA 2013. But before we do that, we bear in mind the decision of *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281 ('*Ang Ming Lee*'). In *Ang Ming Lee*, based on a settled line of precedents, this court construed the Housing Development (Control and Licensing) Act 1966, which was passed to protect house buyers from developers, as a social legislation.

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[25] A statute is said to be a 'social legislation' when Parliament passes the statute for a beneficent reason with the intention to ease or facilitate the affairs of, or protect a certain section or group of persons (see *Hoh*

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- A *Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369; *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011] 2 MLJ 141).
- B [26] It was passed to facilitate the affairs of strata living for the good of the community or owners of the strata title. Being social in nature, the provisions of the SMA 2013 which safeguard community interests ought to receive a liberal interpretation and not a restricted or rigid one. Accordingly, where two different interpretations are possible, it is the one which favours the interest of the community over the interest of the individual that is to be preferred. This is in line with the aforementioned decisions in *Ang Ming Lee* and *Hoh Kiang Ngan*.
- C [38] As stated earlier, the plaintiff argued the instant case should be distinguished from *Ang Ming Lee*. I find there is some basis to this argument. The factual matrix of the two cases are quite different. I observe two aspects in the instant case which were absent or wholly irrelevant in *Ang Ming Lee*.
- D [39] First, it is fair to say that in the absence of the extension, or if it had been refused by the Housing Controller, the plaintiff would not have undertaken the project as the plaintiff was fully cognisant at the planning stage and before any works had been commenced or before any SPAs were executed, that the construction timeline for the said project would be considerably affected by its site restrictions, location and cost effectiveness.
- E [40] Commercially too, it would have been impossible to complete Residensi Star within 36 months, knowing full well that the plaintiff would then be contractually obligated to pay LAD to the purchasers for each day of delay.
- F [41] In *Ang Ming Lee* the request for the extension of time was made after the commencement of the project and subsequent to the execution of the sale and purchase agreements with the purchasers.
- G [42] Secondly, and not unrelated to the above, is that the defendants at the material time – even prior to the execution of the SPAs – were equally fully cognisant that the delivery of vacant possession of the parcels and the completion of common facilities for the project would be 60 months from the date of the SPAs. They had never expected, on the basis of the SPAs (inclusive of the terms on the purchase price, as discounted and granted rebate) receiving the delivery of vacant possession of the parcels together
- H with the completed common facilities of Residensi Star within 36 months. The defendants had also never raised any objections towards the extension, such as after the first 36 months had lapsed, until after the decision in *Ang Ming Lee*, post the delivery of vacant possession by the plaintiff.
- I [43] In contrast, the purchasers in *Ang Ming Lee* were not told that after the execution of the agreements with the purchasers, the developer applied for an extension beyond the 36-month period originally stated in the

agreements. The purchasers in that case were clearly denied the right to be heard prior to the developer pursuing the unilateral amendment which had been approved by the Ministry.

[44] There is one other distinction which I accept for present purposes is less significant. Unlike in *Ang Ming Lee* where the extension was granted by the Minister on an appeal pursuant to reg. 12 of the Regulations, the extension in the instant case was granted by the Housing Controller under reg. 11(3) of the Regulations 1989. There was no appeal here.

[45] However, in *Ang Ming Lee*, although the extension of time was granted by the Minister on appeal, the letter of extension of time was in fact signed by the Housing Controller and not the Minister. This was found to have been erroneous and the Federal Court held that in an appeal under reg. 12, only the Minister could issue the letter of extension and not the Housing Controller. As such, in the instant case, unlike in *Ang Ming Lee*, there is no irregularity as to which party signed and issued the extension under reg. 11(3) of the Regulations.

Application Of Ang Ming Lee

[46] The essence of these distinctions had been raised and accepted in a number of cases post-*Ang Ming Lee*, as referred to by the plaintiff in its submissions.

[47] For present purposes, I think it suffices that I mention them in summary fashion. In a judicial review, the High Court in *Lee Shy Tsong & Yang Lain lwn. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Yang Lain* [2020] 1 LNS 1641 dismissed the application filed by the purchasers to declare the letter of extension issued by the Housing Controller allowing the amendment of the completion date in Schedule H from 36 months to 48 months to be invalid and *ultra vires* the HDA.

[48] In *Star Effort Sdn Bhd v. Tiong Sie Kwon & Ors* via Kuala Lumpur High Court Originating Summons No WA-24-7-02-2020 the High Court allowed a declaration sought by the developer that the letter of extension granted by the Housing Controller to amend the completion date in the agreement as prescribed in Schedule H from 36 months to 48 months to be valid and that cl. 25 and cl. 27 of Schedule H which had been amended to 48 months is enforceable against the purchasers.

[49] Further in *Dsara Sentral Sdn Bhd lwn. Tribunal Tuntutan Pembeli Rumah & Satu Lagi* [2020] 1 LNS 1172 the extension was held to be invalid because it was granted to the developer after the purchasers had signed the agreements which contained the 36 months completion period. There was also no amendment made to cl. 25 and cl. 27 of Schedule H despite the extension of time. Clearly in that case the purchasers were not notified of the extension until the delivery of the vacant possession of the parcels, and then were denied the right to claim for LAD. The High Court observed:

- A [28] Mahkamah juga bersetuju dengan hujahan pihak Responden Kedua bahawa memandangkan kelulusan lanjutan tempoh masa tersebut adalah di antara Pemohon dan Jabatan Perumahan Negara, serta tiada variasi terma dilakukan terhadap Klausa 25 dan 27 Perjanjian tersebut, maka Responden Kedua adalah tidak terikat sama sekali dengan kelulusan lanjutan tempoh masa 48 bulan tersebut. Responden Pertama di dalam
- B Awadnya telah mengambilkira faktor relevan ini dan apa-apa ketinggalan atau kesilapan di pihak Pemohon dalam membetulkan tempoh lanjutan dalam Perjanjian Jual Beli tersebut tidak memberi sebarang justifikasi kepada Responden Pertama untuk membuat keputusan sebaliknya.
- C [29] Dari tarikh Pemohon menerima kelulusan lanjutan tempoh masa daripada Jabatan Perumahan Negara iaitu pada 31.3.2015, sehingga suatu tarikh notis serahan milikan kosong diberikan kepada Responden Kedua pada 15.8.2018, Pemohon mempunyai masa yang sangat panjang, iaitu lebih kurang 3 tahun 4 bulan untuk membangkitkan dan/atau memaklumkan isu lanjutan tempoh masa tersebut kepada Responden Kedua. Walau bagaimanapun, Pemohon telah gagal untuk berbuat demikian. Justeru itu, Pemohon adalah diestop daripada membangkitkan isu kelulusan lanjutan tempoh masa tersebut.
- E [50] And more directly in the case of *Eco Green City Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor* [2020] 1 LNS 430; [2020] MLJU 461, which concerned agreements subject to Schedule G where the completion period is 24 months, as against 36 months under Schedule H, *Ang Ming Lee* was expressly distinguished, where it was pronounced that the ruling was not applicable if the extension of time was granted prior to the signing of the sale and purchase agreements by the purchasers. The High Court stated thus:
- F [35] The SPA provides vacant possession is to be delivered within 36 months. The learned counsel for the 2nd to 4th respondents submitted that this contravened the statutory contract under Schedule G of the 1989 Regulations and cited *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162. I am of the view that *Ang Ming Lee* is distinguishable on facts as in
- G the matter before me there was no modification or extension after the signing of the SPA. No evidence was led or any issue being raised before the Tribunal whether the SPA was not in conformity with Schedule G with regard to the completion period. The issue was never raised or addressed by the parties. When the parties entered into the SPA on 11.1.2016 the completion period was already fixed at 36 months.
- H [51] It is of course trite that as a matter of *stare decisis*, one High Court is not bound by a decision of another High Court. Ong Hock Thye FJ in *Sundralingam v. Ramanathan Chettiar* [1967] 1 LNS 173; [1967] 2 MLJ 211 held as follows:
- I Each court, of course, is bound by the decisions of courts above it, but “individual judges are not bound by each other’s decisions, although judicial courtesy naturally requires that they do not lightly dissent from the considered opinions of their brethren”: see *Law in the Making* (6th Ed.)

p. 231. I do not think I can usefully add anything to what Sir Carleton Allen said, except to point out that, within the past decade and even the last lustrum, judges in Malaya have, on several occasions respectfully agreed to differ, as may be seen from the reports in *The Malayan Law Journal*.

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[52] At the same time, however, it would be remiss of me not to mention two other decisions of the High Court that have taken a contrary approach (*vis-à-vis* the other abovementioned High Court cases) to the application of *Ang Ming Lee*. The first is the decision in the abovementioned case of *Alvin Leong Wai Kuan & Ors v. Menteri Kesejahteraan Bandar, Perumahan Dan Kerajaan Tempatan & Ors And Other Application* [2020] 6 CLJ 55; [2020] 10 MLJ 689, touched on earlier, where the decision means that the ruling of the Federal Court in *Ang Ming Lee* would apply to cases where the extension of time was obtained even **before** the signing of the sales and purchase agreement between the purchaser and the developer (like in the instant case).

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[53] There are in fact two extensions of time for delivery of vacant possession in *Alvin Leong*. The first extension was from 36 months as prescribed under Schedule H to 42 months which was obtained by the developer (third respondent) from the Housing Controller (second respondent) before the sales and purchase agreement was signed between the developer and applicant. The second extension of time was from the 42 months to 54 months, which was granted by the Minister (the first respondent) after the signing of the sales and purchase agreement.

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[54] These passages from the judgment of Wong Kian Kheong J are especially instructive:

Whether Second Respondent Can Extend 36 Months Period

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[30] As a matter of *stare decisis*, the Federal Court's judgment in *Ang Ming Lee* is binding on me. Premised on *Ang Ming Lee*, reg. 11(3) HDR is invalid and the second respondent cannot therefore exercise any power under reg. 11(3) HDR to extend the 36 months period (prescribed in Schedule H) to:

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- (i) 42 months period (second respondent's first extension); and
- (ii) 54 months period (second respondent's second extension).

[31] In addition to *Ang Ming Lee*, there is another reason to invalidate the second respondent's first and second extensions. I am of the view that reg. 11(3) HDR (the basis for the second respondent's first and second extensions) cannot be an exception to the SPA prescribed in reg. 11(1) HDR (statutory SPA). I reproduce below reg. 11(1), (1A), (1B) and (3) HDR:

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Firstly, reg. 11(1) HDR which prescribes for the statutory SPA is a mandatory provision. This is clear from the use of the mandatory term "shall" in reg. 11(1) HDR – please see *Sri Damansara Sdn Bhd v. Tribunal*

- A *Tuntutan Pembeli Rumah & Ors* [2018] 1 LNS 2185; [2020] MLJU 170, at [22]. There are only two exceptions to reg. 11(1) HDR, namely reg. 11(1A) (Notwithstanding para. (1)) and 11(1B) HDR (sub-reg. (1) ... shall not apply). There is nothing in reg. 11(3) HDR which provides that the reg. 11(3) HDR shall override the statutory SPA as prescribed mandatorily by reg. 11(1) HDR. Accordingly, the second respondent cannot invoke
- B reg. 11(3) HDR to “waive or modify” the 36 months period in the statutory SPA.
- [55] The second is the case *Kok Chay Har & Ors v. BH Realty Sdn Bhd* [2021] 1 LNS 13 which also concerned the statutory contract of sale prescribed under Schedule H, where the purchasers averred that after the respective sale and purchase agreements were signed, the developer amended the said time in the agreements to 42 months without the knowledge and consent of the purchasers. The developers had obtained two separate extensions of time for the delivery of vacant possession; the first was for a period of six months from 36 months to 42 months; the second was likewise for the subsequent
- C period of six months from 42 months to 48 months. The developer maintained that the extensions were communicated to the purchasers, but the latter complained that they were not given a chance to be heard before the Housing Controller granted the extensions.
- D [56] In the end, vacant possession was delivered within the extended period of 48 months. The plaintiffs (purchasers) pleaded that the delivery was late since it was outside of the stipulated period of 36 months, resulting in a writ action against the developer to claim for LAD. The application by the developer to strike out the claim failed.
- E [57] The High Court held as follows:
- F [17] Under the doctrine of *stare decisis*, I am bound by and must follow *Ang Min Lee (supra)*. I am therefore constrained to hold that the Time Extensions granted by the Controller in the present case is invalid. The Time Extensions relied on by D were granted by the Controller pursuant to regulation 11(3) of the Housing Development Regulations, which was
- G also the case in *Ang Ming Lee*. The Controller however has no power to waive or modify the 36 months period stipulated in the Statutory Contract of Sale. Consequently the amendment made to the SPA (which changed the 36 months period to 42 months), premised on the 1st Time Extension, is void. I am therefore of the opinion that the Plaintiffs have a reasonable cause of action to claim LAD against D.
- H [58] It is unclear whether the extensions in that case were granted before or after the entry into the sale and purchase agreements. However, it is probably safe to surmise that the first could have been granted prior to the execution of the said agreements and the second was after the execution. This is based on the reference in the judgment that the agreements with the
- I purchasers were signed “between 8 August 2013 and 19 March 2014”, whilst the extensions were granted “*vide* letters dated 2 July 2013 (“first time extension”) and 30 September 2015 (“second time extension”).

[59] In that regard, the facts were therefore not unlike those in *Alvin Leong* (supra) which also involved two extensions, one before and one after the execution of the agreements. And like *Alvin Leong*, the case of *Kok Chay Har* (supra) did not seem to find the distinction to be of significance, and in fact did not even discuss the point. Which I find wholly unsurprising since reg. 11(3) has already been declared to be *ultra vires* by *Ang Ming Lee*.

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[60] In my judgment, even though these cases reveal certain distinctions in the factual matrix, which were then applied by distinguishing *Ang Ming Lee* in decisions such as *Lee Shy Tsong*, *Star Effort* and *Eco Green City*, the approach that must be taken is undoubtedly and inescapably one that follows the most crucial ruling in *Ang Min Lee* that reg. 11(3) of the Regulations which confers on the Housing Controller the powers to waive or modify any provisions in the statutory agreement in Schedule H is *ultra vires* the HDA. It follows that it matters not that the extension was granted before or after the sale and purchase agreements were signed with the purchasers. And this position is, in my view correctly, reflected in the cases of *Alvin Leong* and *Kok Chay Har*.

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[61] I would also say that in this context, it is no less immaterial whether the purchasers had noticed let alone been afforded the right to be heard of the extensions that led to the amendments to the agreements. These considerations are irrelevant in the context where reg. 11(3) which was the source of all these extensions of time in these cases has now been ruled by our apex court to be void and *ultra vires* the applicable statutory provisions in the HDA.

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Prospective Overruling

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[62] Notwithstanding, the plaintiff argued that given the facts in the instant case particularly about the extension being granted before the entry of the SPAs warranted that the decision in *Ang Ming Lee* ought to be interpreted to apply only prospectively.

[63] This question was examined by the High Court in *Alvin Leong* (supra) which held that as the Federal Court in *Ang Ming Lee* has not expressly ruled that its decision can only have prospective effect, in accordance with the general rule, the judgment in *Ang Ming Lee* has retrospective effect and therefore applied to the applications in *Alvin Leong*. It was also decided that there are no exceptional circumstances in *Alvin Leong* for the doctrine of prospective overruling to apply to the decision of *Ang Ming Lee*. On the contrary, as stated in a number of cases, including *Ang Ming Lee*, given that the object of the Regulations and the HDA is to protect a 'homebuyer' (as defined in s. 16A of the HDA), it would be in the interest of purchasers for *Ang Ming Lee* to be given retrospective effect.

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- A [64] The plaintiff nevertheless posited that a dismissal of this originating summons would open the floodgates to all the purchasers of the project to claim for LAD at the expense of the plaintiff. The plaintiff would, it is argued, be unreasonably penalised by the retrospective ruling of *Ang Ming Lee* even though the plaintiff had correctly adopted the procedure that had been set by the Ministry to secure the extension letter. This justified the application of the doctrine of prospective overruling.

- B [65] For support, the plaintiff referred to the decision of the Federal Court in the landmark case of *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526; [2017] 3 MLJ 561 where the ruling on the unconstitutionality of s. 40D of the Land Acquisition Act 1960 was held to only apply prospectively. Similarly, in *PP v. Dato' Yap Peng* [1987] 1 LNS 28; [1987] 2 MLJ 311 the Supreme Court gave prospective effect to its decision after taking into account that the decision that the former s. 417 of the Criminal Procedure Code was unconstitutional, if applied retrospectively, would result in creating chaos.

- D [66] Then there is also the House of Lords decision in *National Westminster Bank plc v. Spectrum Plus Limited & Ors* [2005] All ER 209 which discussed this doctrine. Lord Nicholls said this:

- E [40] Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have such gravely unfair and disruptive consequences for past transactions or happenings that this House would be compelled to depart from the principles relating to the retrospective and prospective effect of court decisions.

- F [67] Lord Hope had this to say:

- G [74] Where the future may lead us we cannot tell. So, like my noble and learned friend Lord Nicholls, I would not rule out the possibility that in wholly exceptional case the interest of justice may require the House, in the context of a dispute about the state of the common law or even about the meaning or effect of a statute, to declare that its decision is not to operate retrospectively.

- H [68] I do not disagree that there may be some basis to the contention that there could in the instant case be some exceptional circumstances (which did not arise in *Ang Ming Lee*) that would justify the decision in *Ang Ming Lee* being applied prospectively. But the important point here is that the Federal Court in *Ang Ming Lee* did not pronounce expressly or by implication that its decision must have prospective effect on all the letters of extension of time which had been previously issued under the impugned provision of the Regulations to the developers.

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[69] In my view, from the cases that have been referred to by parties, such as *Semenyih Jaya* (*supra*), *Dato' Yap Peng* (*supra*) and *National Westminster Bank plc* (*supra*) two key propositions on the application of the doctrine of prospective overruling may be stated. The first is its application must be declared by the court which actually decided on the case which resulted in the departure from or the change in the law. It would not be right for another court, what more if inferior in status such as the High Court herein *vis-à-vis* the Federal Court in *Ang Ming Lee* to provide its ruling on whether that decision of the apex court should be applied prospectively or otherwise. I do not think it was right for me to declare that the ruling in *Ang Ming Lee* be applied prospectively in so far as the instant case is concerned, as urged by the plaintiff at the hearing.

[70] Secondly, as weighty constitutional and legal issues of major and wide importance are often ultimately heard at the highest court, it is also for the apex court that should ordinarily decide whether or not its ruling that resulted in the change or departure should be applied prospectively instead of the usual retroactive application. That was indeed the pronouncement made by the Supreme Court in *Yap Peng* and the Federal Court in *Semenyih Jaya*. If the verdict on fresh interpretation of the law did not come with any declaration as to whether the ruling should apply prospectively, then the general rule that all judgments of the courts apply retrospectively takes effect (see the decision of the Court of Appeal in *Abillah Labo Khan v. PP* [2002] 3 CLJ 521; [2002] 3 MLJ 298).

[71] In principle, there should not be any substantive objection to a decision of the High Court, if it results in changes to the law, to be accompanied with a pronouncement of prospective overruling. High Courts after all can decide on constitutional questions (art. 4 of the Federal Constitution). In any event, even if they are adjudicated at the level of the High Court, such important decisions would in all likelihood be appealed to the Court of Appeal and the Federal Court which will eventually decide on the same questions, including on whether they should apply prospectively instead.

[72] As such the ruling on reg. 11(3) of the Regulations being void is to be applied retrospectively.

Whether Estoppel Applies

[73] The plaintiff argued that on the facts of this case, the defendants should be estopped from challenging the validity of the SPAs that contained the time period of 60 months which they had duly signed on. The defendants on the other hand contended that the doctrine of estoppel does not apply against a statute or statutory agreement such as in the instant case which revolves around the clauses of a statutory agreement as prescribed in Schedule H to the Regulations. The principle of waiver or estoppel is in other words not applicable when reg. 11(3) of the Regulations is *ultra vires* the HDA.

- A [74] The High Court in the case of *Ngo Ong Chung & Ors v. Pengarah Tanah Dan Galian Perak Darul Ridzuan* [2013] 1 LNS 146; [2013] 10 MLJ 879 clearly stated that an *ultra vires* act cannot be legitimised through estoppel, waiver or agreement between parties. The doctrine of estoppel cannot be invoked so as to give an authority power it does not in law possess. Thus
- B statutory power cannot be extended by creating an estoppel nor can an action which is *ultra vires* be legitimised by estoppel. Similar rules would apply to the issue of waiver and consent. The Federal Court in *Silver Corridor Sdn Bhd v. Gallant Acres Sdn Bhd & Anor* [2016] 7 CLJ 823; [2016] 5 MLJ 1 also held that estoppel, being an equitable principle cannot operate to defeat clear
- C statutory provisions of law.
- D [75] As such, this would mean that the extension granted by the Housing Controller which was *ultra vires* cannot be legitimised by any waiver, estoppel or agreement on the part of the defendants. As the extension is void, the time period for the plaintiff to deliver vacant possession and to complete the common facilities would revert to 36 months from the date of the SPAs in accordance with cls. 25(1) and 27(1) of the prescribed contract in Schedule H.
- E [76] However, I am also mindful that the key consideration in *Ang Ming Lee* on the need of the purchasers as the aggrieved parties who needed the protection from the court is absent and irrelevant in the instant case. Here, both the plaintiff and the defendants were under the assumption that the extension letter was valid, not void or illegal when they executed the SPAs at that material time. The plaintiff had proceeded on and relied on the conduct of the purchasers, including the defendants and was of the belief that
- F the time to deliver the vacant possession were agreed to be extended to 60 months and as such accordingly agreed to sell the parcels to the purchasers. As I have stated earlier, the plaintiff would never have otherwise agreed to sell the parcels to the purchasers at the agreed purchase price (discounted and with rebates) and to commence the construction works of the project. In fact,
- G it would not be wrong to state that at all material times the plaintiff had acted as a responsible developer in making the application to amend the construction period of 36 months to 60 months in Schedule H before entering into the SPAs with the purchasers, including the defendants. There is also absolutely no ambiguity in the language of cl. 25 and cl. 27 of the SPAs.
- H [77] There was nothing untoward in the application for the extension which was supported by the experts and consultants for the project. The procedures to apply for the extension is governed by the Ministry. At all material times, the plaintiff was merely complying with the procedures of the Ministry and the law as then prevailing including in reg. 11(3) of the Regulations.
- I Crucially in my view, there is no suggestion let alone evidence that the plaintiff at any material time had engaged in any illegality in the making of the application for the extension then.

[78] In contrast, in the other cases, there were elements of irregularity and illegality – on the part of the developers. In *Ang Ming Lee, Alvin Leong and Kok Chay Har* for examples, applications for extension of time were made and approved after the relevant agreements had been signed with the purchasers without giving them the right to be heard on the extensions.

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[79] In *Loh Tina & Ors v. Kemuning Setia Sdn Bhd & Ors And Another Appeal* [2020] 7 CLJ 720 the developer was found to have deviated from the provisions of the HDA and the Regulations by modifying the standard statutory form of the sale and purchase agreement without a certificate of the Housing Controller approving the modification. The developer was ruled to have breached the HDA and the Regulations. The Court of Appeal held that the purchasers would be entitled to enforce their rights as if the agreements had been in its prescribed form without any amendment, and to hold the developer to the terms prescribed by Schedule G of the Regulations.

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[80] In an important observation, the Court of Appeal also stated that having exercised the right to claim for liquidated damages for late delivery, the purchasers cannot be said to be estopped from pursuing their other rights under the agreements in a case where that right had been unlawfully taken away from them in breach of the HDA and the Regulations. It was emphasised that the intention of Parliament was clearly to prevent purchasers who may not be fully aware of their rights to be exploited by developers to the purchasers' detriment.

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[81] It is noteworthy that in *Loh Tina* too, the Court of Appeal held that the doctrine of unjust enrichment does not apply when the Regulations compels compliance with the statutory standard form of the agreement and the developer fails to follow such statutory standard. No similar allegation can be levelled against the plaintiff in this case before me.

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[82] The Court of Appeal in *Loh Tina* observed that the only way the developer could modify or amend the contract of sale in Schedule G was by securing the certificate from the Housing Controller and satisfied the circumstances as specified under reg. 11(3) of the Regulations. In *Loh Tina*, the developer was fully aware of such requirement but yet failed to comply. The situation in the instant case is different.

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[83] I revert to the objective of the HDA to protect the weaker party which is the purchaser. I further observed that the meaning of social legislation was further explained by Her Ladyship Tengku Maimun Tuan Mat CJ in *PJD Regency Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor And Other Appeals* [2021] 2 CLJ 441 as follows:

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The Concept of Social Legislation

[27] That the HDA 1966 and its subsidiary legislation are social legislation is settled beyond dispute (see the decisions of the Federal Court in: *Veronica Lee Ha Ling & Ors v. Maxisegar Sdn Bhd* [2009] 6 CLJ 232; [2011]

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- A 2 MLJ 141 and *Ang Ming Lee & Ors v. Menteri Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Anor And Other Appeals* [2020] 1 CLJ 162; [2020] 1 MLJ 281).
- B [28] The long title of a statute is relevant to its interpretation (see s. 15 of the Interpretation Acts 1948 and 1967). The long title of the HDA 1966 provides in no uncertain terms that it exists, in Peninsular Malaysia, for the protection of the interest of purchasers and for matters connected therewith.
- C [29] The social significance of the statute is further borne out by the words of Suffian LP in *SEA Housing Corp Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305; [1982] 2 MLJ 31 (“*SEA Housing*”), at p. 311 (CLJ); p. 34 (MLJ):
- D It is common knowledge that in recent years, especially when government started giving housing loans making it possible for public servants to borrow money at 4% interest per annum to buy homes, there was an upsurge in demand for housing, and that to protect home buyers, most of whom are people of modest means, from rich and powerful developers, Parliament found it necessary to regulate the sale of houses and protect buyers by enacting the Act. That was why rule 12 was enacted and in particular paragraphs (o) and (r) thereof. With respect we do not agree with Mr. Chelliah that it was open to a developer to get round these paragraphs by the inclusion of such a clause as clause 32 in this agreement.
- E [30] It appears that even since 1982, housing developers have continued to devise ingenious, and if we may say so, devious schemes to overcome the protections afforded to purchasers by the scheme of the HDA 1966. We would say here that booking fees are one such invention. How is the concept of social legislation relevant to the weeding out of such practices?
- F [31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is “social legislation”. A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this court interpreted the Industrial Relations Act 1967 in *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor* [1996] 4 CLJ 687; [1995] 3 MLJ 369 (“*Hoh Kiang Ngan*”).
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- I [84] In *PJD Regency (supra)* the developer failed to deliver vacant possession within the time stipulated in the statutory sale and purchase agreement, and the Federal Court held that the calculation of the LAD begins from the date of payment of the booking fee and not from the date of the statutory agreement. This is fortified by the HDA and the Regulations being social legislation. And in the interpretation of a social legislation, the court must give effect to the intention of Parliament and not the intention of parties. Otherwise, the attempt by the Legislature to level the playing field by

mitigating the inequality of bargaining power would be rendered illusory. Again, here, that the HDA is a social legislation was emphasised because it needed to be in the face of a breach by the developer. In contradistinction, no irregularity can be accused against the plaintiff in the instant case before me. A

[85] Not only do these cases involve some form of illegality, default of irregularity on the part of the developers, which is absent in the instant case, but that it is quite evident and it does appear that unlike the purchasers in *Ang Ming Lee* and *Loh Tina* the defendants in the instant case are resorting to the authority of *Ang Ming Lee* to unjustly enrich themselves despite the fact that the defendants were expecting the completion of the project within 60 months and they did receive the vacant possession of the parcels within the expected and agreed period of 60 months in accordance with the SPAs, without any protest and objection, and on purchase terms predicated on the said period of 60 months. B C

[86] And if the LAD claims are allowed (the total LAD allowed for each unit of the parcels is about 20% on the purchase price of the SPAs) and after taking into account the 12% rebate, and considering the costs of constructions among others, the actual purchase price paid by the defendants for a unit of condominium at Residensi Star would be unreasonably cheap to the detriment of the financials of the developer. The purchasers should be estopped from not following the SPAs as executed by them by taking advantage of the ruling in *Ang Ming Lee* to unjustly enrich themselves. D E

[87] As such, in my view even though there is absolutely no disputing that the extension is not valid given that reg. 11(3) has been ruled to be *ultra vires*, in situations like presently where the modifications such as the extension was secured prior to the execution of the contract of sale under Schedule H with the purchasers and obtained without any illegality or irregularity on the part of the developer, and there is no concerns about the need to ensure the protection of the purchasers in the SPAs, the doctrine of estoppel by conduct could be applied to prevent the defendants from denying the terms as contained in the SPA. F G

[88] Reliance may be made on s. 115 of Evidence Act 1950 on estoppel which states as follows:

When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief otherwise than but for that belief he would have acted neither he nor his representative in interest shall be allowed in and suit or proceeding between himself and that person or his representative in interest to deny the truth of that thing. H

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- A [89] Given the facts, estoppel by convention may be applied, as explained by Gopal Sri Ram JCA (as he then was) in the case of *Masjaya Trading Sdn Bhd v. Kedah Cement Sdn Bhd* [2004] 4 CLJ 18 as follows:

B Having objective regard to the totality of the evidence, we consider estoppel by convention to be the most appropriate method of giving effect to the true intention of the parties in the present instance. We say “objective regard” advisedly because the law requires an objective test for determining and giving effect to the intention of the parties to a contract. It is of interest that in an article titled “*Hannah Blumenthal and Classical Contract Law*” [1986] 102 LQR 363, Professor Atiyah, a jurist whose views are held in high regard by courts throughout the Commonwealth has argued that the objective test, in substance, involves some form of estoppel.

C The ambit of the doctrine of estoppel by convention was explained by Lord Steyn in *The Indian Endurance (No 2), Republic of India v. India Steamship Co Ltd* [1998] AC 878 at 913 as follows:

D It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being either shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption: *K. Lokumal & Sons (London) Ltd. v. Lotte Shipping Co. Pte. Ltd.* [1985] 2 Lloyd’s Rep. 28; *Norwegian American Cruises A/S v. Paul Mundy Ltd.* [1988] 2 Lloyd’s Rep. 343; *Treitel – The Law of Contract*, 9th ed. (1995), pp. 112-113. It is not enough that each of the two parties acts on an assumption not communicated to the other. But it was rightly accepted by counsel for both parties that a concluded agreement is not a requirement for an estoppel by convention.

E In *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283, the Federal Court established the true nature of the doctrine of estoppel in all its facets:

G The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.

H In the present case, the question is this: Based on the conduct of the parties did they intend that the contracts were to confer on the plaintiff the exclusive right to perform the service in question? In our judgment, based on all the circumstances of the case this question must receive an affirmative answer.

- I [90] Similarly in the case before me, the estoppel should apply for based on the conduct of the plaintiff and the defendants before and after the execution of the SPAs, the parties had incontrovertibly agreed on the

completion timeline of 60 months as recorded in the SPAs (which had been first preceded by a then valid process which secured the extension), and where the parties had accordingly arranged their respective obligations and affairs in reliance of the same. The plaintiff began construction and delivered vacant possession almost 60 months after execution of the SPAs on purchase terms which took into account the completion timeline of 60 months, and the defendants too made the progress payments over the same period. The period of 36 months never featured in the relationship between the parties before *Ang Ming Lee*. It would be extremely unjust if the defendants are allowed to now claim that delivery of vacant possession must instead be made within 36 months.

[91] The basis of estoppel by conduct is that a party has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs which another has taken to be settled or correct (see also the High Court decision in *Ho Shee Jan v. Stephens Properties Sdn Bhd* [1984] 1 LNS 155; [1986] 2 MLJ 43).

[92] Further, whilst it is clear as highlighted by the defendants that estoppel does not apply when its effect is to stop authorities such as TNB from enforcing its statutory right under the relevant Act (see the Federal Court decision in *Tenaga Nasional Bhd v. Ichi-Ban Plastic (M) Sdn Bhd & Other Appeals* [2018] 3 CLJ 557) this estoppel against the defendants does not on the facts of the case have the effect of impeding the exercise of any statutory authority, such as by the Ministry under the HDA.

[93] Now it must be reiterated and clarified lest it be misunderstood that in this case, the extension letter and the extension are undoubtedly void as a result of *Ang Ming Lee*. However, the defendants should be estopped from not honouring the terms of the SPAs, even though the timeline of 60 months in the SPAs emanated from the extension. The SPAs themselves although prescribed under Schedule H to the Regulations, are essentially still contractual documents that bind the contracting parties. In *Loh Chow Sang & Anor v. Meru Valley Resort Bhd* [2001] 8 CLJ 410; [2002] 2 MLJ 666 for example, it was held that the sale and purchase agreement made under the HDA need not be read alone but may be read together with the Contracts Act 1950.

[94] In addition, it can also be argued that the SPAs have created a new contractual agreement between the parties on the timeframe of 60 months for the plaintiff to deliver vacant possession and to complete the common facilities. After all under s. 64 of the Contracts Act 1950, every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

- A [95] This does not in this case amount to creating a separate agreement outside the Schedule H or a contracting out of the HDA because the new agreement does not involve the purchaser accepting a lower sum of LAD or waiving their rights to claim against the developer. The following passage from the judgment of the Court of Appeal in *Oxbridge Height Sdn Bhd v. Abdul Razak Mohd Yusof & Anor* [2015] 2 CLJ 252 is especially instructive:

- B [30] Thus, even in the settlement agreement there was no total contracting out of the LAD provision in the SPA. If delivery of vacant possession had not been delivered by the new completion date, the respondents would have been at liberty to sue on the basis of the original LAD provision. We therefore found that on the peculiar facts of this appeal, there was no full contracting out and no situation where the purpose of the housing legislation being “to protect the weak against the strong” was ousted ...
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- D [96] Similarly in the instant case, the purchasers’ right was not ousted in the SPAs, and no situation where the essence of the provisions to protect the purchasers as the weaker parties had been removed. And even if there had been a delay, the defendants would have been entitled to sue under the original LAD provision of 36 months, following *Oxbridge Height*.

Conclusions

- E [97] Whilst it is crystal clear from *Ang Ming Lee* that the Housing Controller has no powers to grant extensions under reg. 11(3) which is thus *ultra vires* the HDA, I do not see how the counterclaims by the defendants for LAD can be said to be a genuine pursuit to enforce the right of the weaker party against a defaulting stronger party (the plaintiff) which could instead potentially result in the defendants gaining an unfair benefit at the expense of the plaintiff. The plaintiff did not commit any illegality, irregularity or depart from the provisions of the Regulations in force at the material time. The plaintiff adhered to the requirements of the Regulations, applied for the extension under reg. 11(3) which was allowed by the Housing Controller before the amendments were made to cls. 25 and 27, and prior to the execution of the SPAs with the defendants. There were no unilateral amendments, no amendments after the execution of the SPAs, and there was no appeal to the relevant Minister either. And there was absolutely no denial of the right to be heard to the defendants as the purchasers.
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- H [98] Whilst taking full cognisant that the Regulations and the HDA are social legislation designed to protect the interest of the purchasers, the courts are ever entrusted with the duty to ensure that justice is served. An appropriate balance must be struck after taking into account the interests of especially the purchasers and also the developers, whilst at the same time not oblivious to the context of the housing development industry – of not only
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future but also completed and pending projects. As such, in my view, although reg. 11(3) is now *ultra vires*, on the very specific facts of this case, the defendants are estopped from reneging on the SPAs and claiming LAD since all parties were under the same belief that the extension was valid at the time of the execution of the SPAs and the entire extension process was validly performed *sans* any infringement at the material time.

[99] Based on the foregoing analysis, whilst I deny prayer 1 for a declaration that the extension letter is valid, because it is not, I decided by reason of the application of the principle of estoppel, to allow the declaration that the time to deliver the vacant possession for the parcels and the completion of the common facilities for the project as stated under cl. 25(1) and cl. 27(1) of the SPAs as 60 months from the date of the SPAs to be valid and enforceable.

[100] As such, the plaintiff's originating summons, specifically prayer 2 is allowed, and the counterclaims dismissed, with costs.

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